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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 172

WALTER W. JOHNSON COMPANY, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California (R. 243-274) is reported at 137 F. Supp. 855. The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1-3), dismissing the first appeal, is reported at 223 F. 2d 101. The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 4-7), which affirmed the judgment of the District Court, is reported at 230 F. 2d 479.

JURISDICTION

The judgment of the Court of Appeals was entered on February 10, 1956 (Pet. App. 4), and a petition for

rehearing was denied on March 22, 1956 (Pet. 2). The petition for a writ of certiorari was filed on June 18, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the six year statute of limitations on claims against the United States, which barred petitioner's counterclaims, can be waived by officials of the Reconstruction Finance Corporation.

STATEMENT

On May 11, 1937, petitioner entered into a contract to construct a gold dredge for the Tuolumne Gold Dredging Corporation (R. 192-205). On the same day, Tuolumne executed an indenture and chattel mortgage for the benefit of the Reconstruction Finance Corporation to secure payment of a $600,000 loan made pursuant thereto and to be used for construction of the dredge and related purposes (R. 17-69). Under their agreement, both petitioner and Tuolumne were bound by the terms of this indenture and mortgage (R. 193). The dredge was completed in June, 1938, by which time petitioner had been paid $510,000 out of the construction fund established by the RFC loan (R. 119-120). After this date, RFC refused to authorize any further payments because of a dispute between Tuolumne and petitioner regarding the balance due on the contract. Petitioner was successful in the subsequent litigation arising out of this dispute (Pet. 5).

In the interim, the balance remaining in the construction fund was withdrawn by Tuolumne, with the approval of RFC, to meet expenses incurred in the operation of the dredge. The entire balance of the

loan made by RFC was thus depleted on September 24, 1938 (R. 80-81).

On November 27, 1939, RFC made another loan to Tuolumne in the amount of $120,000 which was secured by a second indenture and chattel mortgage. The entire amount of this loan was repaid by September 4, 1942, out of Tuolumne's operating income (R. 184-185).

On June 28, 1949, RFC brought a civil action to foreclose the first indenture and chattle mortgage, the loan secured by that mortgage having remained largely unpaid by Tuolumne (R. 3-16). Petitioner was joined as a co-defendant in this action and filed counterclaims, grounded on several legal theories, asking for a senior lien and money judgment against RFC in the amount still due from Tuolumne for construction of the dredge (R. 74-90). The District Court granted respondent's motion for summary judgment dismissing the counterclaims (R. 243-276), principally on the ground that any claims petitioner might have had against RFC were barred by the six year statute of limitations on claims against the United States.[1] Petitioner's first appeal to the Court of Appeals for the Ninth Circuit was dismissed since the District Court had failed, in accordance with Rule 54(b) of the Federal Rules of Civil Procedure, to make an express determination that there was no just reason for delay and an express direction for the entry of a final judgment (Pet. App. 1-3). The District Court subsequently made the required determination and direction, and on the second appeal the Court of Appeals affirmed the judgment "[O]n the

[1] 28 U.S.C. 2401(a) provides in pertinent part:

> Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

grounds and for the reasons stated in the District Court's opinion * * *." (Pet. App. 4-7). A petition for rehearing in the Court of Appeals was denied.

ARGUMENT

1. Petitioner does not contest the District Court's holding that its counterclaim constitutes a claim against the United States, nor does it here challenge the ruling that the right of action first accrued when the balance of the construction fund was depleted on September 24, 1938. Therefore, as a necessary first step in its argument, petitioner must, and does, contend that the statute of limitations in this case was waived by an RFC request to petitioner not to press its claim and by RFC's continuing willingness to negotiate a settlement (Pet. 12-15). But in asserting that limitations may be waived by such statements or conduct, petitioner misconceives the nature of the statute of limitations on claims against the United States. For government claims, the statute of limitations is jurisdictional. Whether viewed as a condition on liability or a limitation on the available remedy, it is clearly a qualification on the right to bring suit and cannot be waived by any public official. *Munro* v. *United States,* 303 U.S. 36; *United States* v. *Michel,* 282 U.S. 656; *Finn* v. *United States,* 123 U.S. 227.

In the *Munro* case, this Court, in holding that a United States District Attorney could not waive the limitation period on war risk insurance claims, declared that "Suits against the United States can be maintained only by permission, in the manner prescribed and subject to the restrictions imposed" (303 U.S. at 41). And in the *Michel* and *Finn* cases, while recognizing that a statute of limitations

is ordinarily an affirmative defense which can be waived, the Court held that the doctrine of waiver is not applicable to claims against the United States. Thus, even if a factual issue does exist here as to action of RFC officials which would otherwise constitute a "waiver," summary judgment was properly granted by the District Court since that question does not relate to any material legal issue in this case. Review by this Court would result in a reiteration of what has already become settled law. See *Anderegg* v. *United States*, 171 F. 2d 127, 128 (C.A. 4); *Edwards* v. *United States*, 163 F. 2d 268, 269 (C.A. 9); *Compagnie Generale TransAtlantique* v. *United States*, 51 F. 2d 1053, 1056-57 (C.A. 2).[2] It is noteworthy that the petition does not take any account of the special character of statutes of limitations in claims against the United States but relies solely on the rules pertinent to actions against private individuals.

2. Petitioner has asserted what it denominates five "causes of counterclaim," but which constitute essentially one claim against RFC, *viz.*, that in the circumstances of this case petitioner is entitled to be paid the balance due it for construction of the dredge before the secured loan of RFC is repaid. While holding that the first two "causes of counterclaim" were barred by limitations, the District Court thought it appropriate to deal with the claims of unjust enrichment and constructive trust on the merits, since it was not absolutely certain, due to "the unclear state of the record" (137

[2] It is also well established that substantive rights and defenses available to the Government are not waived by bringing suit, *United States* v. *Shaw*, 309 U.S. 495, or by the "sue and be sued" clauses making certain Government agencies subject to suit, *Korman* v. *FHA*, 113 F. 2d 743 (C.A. D.C.).

F. Supp. at 866; R. 268), that these claims were barred. The court found them to be "clearly without foundation on the merits" (137 F. Supp. at 868; R. 274), and the Court of Appeals agreed without qualification (Pet. App. 7). These holdings were plainly correct. RFC advanced the entire amount of the loan it was obligated to make, and no part of the construction fund was ever redelivered to it. Any repayments to RFC out of the earnings of Tuolumne were strictly in accordance with the indenture and chattel mortgage, by the terms of which petitioner had bound itself to abide.[3] A secured creditor is obviously not unjustly enriched, nor does he become a constructive trustee, merely because, by enforement of his admittedly valid security interest, a general creditor is left without sufficient assets to satisfy his own claim.

3. For similar reasons, petitioner's fifth "cause of counterclaim," for the payment of state sales taxes for which it was entitled to be reimbursed by Tuolumne, also falls as clearly insubstantial. In the words of the District Court, it is based upon "the quaint theory that A can be held liable because he 'admits' that B owes C a debt" (137 F. Supp. at 869; R. 274). Petitioner now states that the taxes are simply a cost item of the dredge and do not constitute a separate basis for liability (Pet. 20).

4. The entire burden of the petition is that summary judgment should not have been granted since there were material issues of fact to be resolved by a trial (see, *e.g.*, Pet 9), but, as we have pointed out, the case was correctly disposed of by the ruling that, as a matter

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[3] Any claim based on repayment of the second loan would be barred since that loan was entirely repaid by September 4, 1942.

of law, petitioner never had a good cause of action and, if a proper claim ever existed, it has long since been barred by limitations. Those legal holdings, based upon an adequate analysis of the case as it stood upon the pleadings and admitted facts, do not warrant further review. And insofar as petitioner may be claiming that the courts below misunderstood the nature of its particular cause of action, the request is to have this Court review the analysis made by the District Court of the pleadings and documents, in which the Court of Appeals completely concurred. This is the kind of review this Court has often stated it will not undertake. *E.g., Houston Oil Co.* v. *Goodrich,* 245 U.S. 440.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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